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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re N.C., a Person Coming Under the
Juvenile Court Law.

B267323

(Los Angeles County
Super. Ct. No. DK11936)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JENNIFER H.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Philip Soto,
Judge. Dismissed as moot.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and
Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County
Counsel, and Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer H. appeals from the juvenile court's August 13, 2015 jurisdiction findings and disposition order declaring her three young sons, N.C., Timothy C. and Matthew C., dependents of the juvenile court and requiring her to participate in a substance abuse treatment program and to submit to random on-demand drug testing. Although Jennifer concedes the acts of domestic violence committed by the children's presumed father, Marco C., as well as his drug and alcohol abuse, support the court's exercise of dependency jurisdiction,¹ Jennifer contends her use of marijuana was insufficient to support either the finding under Welfare and Institutions Code section 300, subdivision (b),² that her own substance abuse placed the children at risk of serious physical harm or the order requiring her to participate in drug treatment and testing as a condition for allowing the children to remain in her custody.

While Jennifer's appeal was pending, the juvenile court sustained a supplemental petition filed by the Los Angeles County Department of Children and Family Services (Department) pursuant to section 387 alleging, based on Jennifer's multiple positive toxicology screens for cocaine and marijuana, that the initial disposition order allowing the children to remain in Jennifer's custody had not been effective in protecting the children. The court removed the children from Jennifer's custody and entered a new case plan for her, requiring, among other services, completion of a full drug-alcohol program with aftercare and random on-demand testing. The juvenile court's orders sustaining the section 387 petition and removing the children from Jennifer's custody, which Jennifer has not appealed, moot the current appeal.³ Accordingly, the appeal is dismissed.

1 Marco is not a party to this appeal.

2 Statutory references are to this code.

3 On May 9, 2016 the Department moved to dismiss Jennifer's appeal as moot and, in support of the motion, concurrently asked this court to take judicial notice of postjudgment evidence, including the supplemental petition filed March 2, 2016, the detention and jurisdiction/disposition reports filed in connection with the section 387 petition and the court's April 29, 2016 minute order reflecting the court's orders sustaining the petition, placing the children with their paternal aunt and uncle, restricting Jennifer to monitored visitation and ordering Jennifer to participate in additional services including drug and alcohol counseling and drug and alcohol testing. Jennifer opposed

FACTUAL AND PROCEDURAL BACKGROUND

1. The Dependency Petition

Marco was arrested for domestic battery on May 12, 2015 after he pushed Jennifer to the ground. Because N.C., then seven years old, had witnessed the violent altercation and Marco told responding officers that Jennifer was using methamphetamine and breastfeeding nine-month-old Matthew, the officers notified the Department. When the social worker spoke with Jennifer, she denied she used methamphetamine but admitted she occasionally smoked marijuana, insisting she smoked it only at night and never in the presence of the children. However, Jennifer acknowledged she “has a hard time getting up in the mornings,” which caused N.C. to have excessive tardies and absences from school. Jennifer agreed to submit to drug testing. On May 29, 2015 she tested positive for marijuana.

The Department initiated dependency proceedings on behalf of N.C., two-year-old Timothy and Matthew on June 24, 2015, pursuant to section 300, subdivisions (a) and (b), alleging (1) Marco and Jennifer had engaged in a violent altercation in N.C.’s presence (counts a-1 and b-1); (2) Marco had a history of substance abuse and currently abused alcohol (count b-2); and (3) Jennifer currently used marijuana, which rendered her incapable of providing regular care for the children and placed them at risk of harm (count b-3). The petition further alleged Jennifer had a positive toxicology screen for cannabinoids on May 29, 2015, she was under the influence of marijuana on prior occasions while the children were under her supervision, and Timothy and Matthew were so young they required constant care.

both requests. The rulings on the two motions were deferred to this panel. We now grant both motions.

The juvenile court detained the children from Marco and released them to Jennifer. The court ordered Jennifer to drug test weekly on demand and directed her not to breastfeed Mathew until she tested clean.

2. The Jurisdiction and Disposition Hearings

In its report for the jurisdiction and disposition hearing the Department stated Jennifer had told the social worker in an interview on August 6, 2015 that she had been using marijuana “about once a week,” “not a lot,” “ever since [she and Marco] separated.” Jennifer also said she “use[d] it in the night after the kids were asleep” and “would smoke it at [her] friend’s house” when she left the children with her mother. She denied any other drug or alcohol use. Jennifer acknowledged she had continued breastfeeding Matthew notwithstanding the court’s order but said she would stop.

The Department expressed concern that Jennifer minimized her marijuana use and failed to appear for drug testing on several occasions despite her repeated assurances she would cooperate and do whatever was necessary to keep her children. According to the attached laboratory reports, Jennifer had tested positive for marijuana on July 24 and missed tests on July 16, 22 and 29, 2015.

At the jurisdiction hearing on August 13, 2015 the court accepted as stipulated testimony the representation of Jennifer’s counsel that, if called as a witness, Jennifer would testify she had not used marijuana since the court had become involved with her family and also that she had followed the court orders not to smoke in front of the children. Her counsel then argued Jennifer’s admitted past use of marijuana posed no risk of harm to the children.

The court dismissed the section 300, subdivision (a), allegations in the interest of justice and sustained the two subdivision (b) counts in the petition relating to Marco’s acts of domestic violence and substance abuse. The court also sustained count b-3 as to Jennifer, finding “ample evidence” she was still using marijuana and would continue to do so, citing the positive drug test results on May 29 and July 24, as well as her “no shows” on July 16, 22 and 29. Emphasizing the young ages of the children (11 months, two years and seven years old), the court explained it was of no consequence that Jennifer

claimed she only used marijuana outside their presence or after they were asleep: “If you are high, you are high.” Children of these ages, the court continued, “need[] a lot of attention[,] especially at night”; and, if a child woke up sick or needed help or if a fire started and she was “high,” she would be posing a “very high risk” to the children.

Proceeding to disposition the juvenile court removed the children from the care and custody of Marco but allowed them to remain home with Jennifer under the Department’s supervision with a case plan requiring her to participate in parenting education, domestic violence education and individual counseling to address case issues, as well as to complete a drug treatment program and submit to random on-demand drug testing.

3. Subsequent Events

On March 2, 2016 the Department filed a supplemental petition under section 387 alleging Jennifer was a current user of cocaine and marijuana that rendered her incapable of providing N.C., Timothy and Matthew with regular care and supervision and had continued to use illicit drugs despite juvenile court orders for her to participate in substance rehabilitation services. The petition further alleged Jennifer had positive toxicology screens for marijuana on January 22 and 28, 2016, for cocaine on February 18, 2016, and for both cocaine and marijuana on February 24, 2016. Based on these allegations, the Department asserted the current home-of-parent (mother) order was not effective in the protection of the children and recommended it be modified to place the children in the home of a relative. The children were detained from Jennifer and on April 29, 2016, following a hearing at which the court sustained the section 387 petition, suitably placed in the care of a paternal aunt and uncle. Jennifer was ordered to participate in a full drug/alcohol program with aftercare, random on-demand drug testing and a 12-step program, as well as domestic violence and parenting programs and individual counseling. Jennifer’s visitation with the children was restricted to monitored.

On May 9, 2016, after completion of briefing in this court, the Department moved to dismiss Jennifer’s appeal as moot based on the court’s subsequent findings and orders in the section 387 proceedings. Jennifer opposed the motion to dismiss and the

Department's concurrently filed motion for judicial notice of its filings and the court's orders relating to the section 387 petition. Jennifer argued we should decide her appeal based solely on the evidence before the court at the August 13, 2015 combined jurisdiction/disposition hearing. She also asserted the motion to dismiss was premature because she still had time to appeal the court's April 29, 2016 findings and order and, in any event, a decision reversing the original disposition order could provide effective relief since the section 387 petition was based on drug testing information that would not have been obtained if the juvenile court had correctly ruled she was not abusing marijuana. We deferred ruling on the two motions.

DISCUSSION

1. Governing Law and Standard of Review

Section 300, subdivision (b)(1), allows a child to be adjudged a dependent child of the juvenile court when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing, the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.) The court may consider past events in deciding whether a child currently needs the court's protection: A parent's "[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; accord, *In re Kadence P.*, at p. 1384.) Exercise of dependency court jurisdiction under section 300, subdivision (b), is proper when a child is "of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] health and safety." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; accord, *In re Christopher R.*, at p. 1216.)

We review a challenge to the sufficiency of the evidence supporting the juvenile court's jurisdiction findings and disposition order for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Under this standard “[w]e review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible.” (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1384; accord, *In re Drake M.* (2012) 211 Cal.App.4th 754, 763.) Elements of the disposition order providing for remedial services (that is, family reunification or family maintenance services) are evaluated for an abuse of the court’s broad discretion. (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474 [“The juvenile court has broad discretion to determine what would best serve and protect the child’s interests and to fashion a dispositional order accordingly. On appeal, this determination cannot be reversed absent a clear abuse of discretion.”]; accord, *In re Neil D.* (2007) 155 Cal.App.4th 219, 225.)

2. *Jennifer’s Challenge to the Jurisdiction Finding and Disposition Order Related to Her Admitted Use of Marijuana Does Not Present a Justiciable Issue*

Jennifer does not challenge the juvenile court’s jurisdiction findings that Marco’s acts of domestic violence in the children’s presence (count b-1) and his substance abuse (count b-2) placed the children at substantial risk of harm. Because the children were properly found to be dependents of the court based on these findings, we need not consider whether the court erred in concluding Jennifer’s use of marijuana constituted substance abuse creating a substantial risk of serious physical harm for Jennifer’s young children within the meaning of section 300, subdivision (b). (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [jurisdiction finding involving one parent is good against both; ““the minor is a dependent if the actions of either parent bring [him or her] within one of the statutory definitions of dependent””]; *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452; *In re Briana V.* (2015) 236 Cal.App.4th 297, 310-311.)

Moreover, although we may exercise our discretion and reach the merits of a challenge to an additional jurisdiction finding when it serves as the basis for disposition orders that are also challenged on appeal (see *In re Drake M.*, *supra*, 211 Cal.App.4th at

pp. 762-763), even if we were to conclude the juvenile court erred in its assessment of the extent of Jennifer's marijuana use and the severity of the risk it posed to her three children, once dependency jurisdiction had been established based on Marco's conduct, a valid jurisdiction finding relating to Jennifer's admitted use of marijuana was not necessary for the court to enter disposition orders binding on her that were reasonably related to protecting her children. (*In re Briana V.*, *supra*, 236 Cal.App.4th at p. 311 ["The problem that the juvenile court seeks to address need not be described in the sustained section 300 petition. [Citation.] In fact, there need not be a jurisdictional finding as to the particular parent upon whom the court imposes a dispositional order"]; *In re I.A.*, *supra*, 201 Cal.App.4th at p. 1492 ["[a] jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent, once dependency jurisdiction has been established"]; see generally § 362, subd. (a) [the juvenile court "may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child"].) In particular, notwithstanding the absence of a jurisdiction finding involving a parent's substance abuse, the juvenile court may order an admitted drug user with young children to participate in drug testing and treatment. (See *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1005-1007; cf. *In re Carmen M.* (2006) 141 Cal.App.4th 478, 486-487 [juvenile court is authorized to order dependent child to participate in drug testing if reasonably related to protecting the child's safety or well-being].) Accordingly, even without considering the subsequent removal of N.C., Timothy and Matthew under section 387 based on Jennifer's ongoing use of cocaine and marijuana, we would not reach the merits of the current appeal.

3. *The Court's Order Sustaining the Section 387 Petition and Removing the Children from Jennifer's Care and Custody Has Mooted the Pending Appeal*

Any question whether we should consider the merits of Jennifer's appeal from the August 13, 2015 jurisdiction finding and disposition order requiring her to participate in drug testing and treatment as a condition of her continued custody of the children has

been mooted by the juvenile court's now final order of April 29, 2016 sustaining the section 387 petition and removing the children from Jennifer's custody and care.⁴

Generally, an appeal from a juvenile dependency order that has been superseded by subsequent events is moot. (See *In re A.B.* (2014) 225 Cal.App.4th 1358, 1364 [“[w]hen no effective relief can be granted, an appeal is moot and will be dismissed”]; *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488; *In re A.R.* (2009) 170 Cal.App.4th 733, 740.) However, dismissal for mootness in such circumstances is not automatic. If the purported error in the juvenile court's findings or orders could adversely affect the outcome of subsequent dependency or family law proceedings, the appeal is not moot. (*In re A.B.*, at p. 1364 [“[o]n a case-by-case basis, the reviewing court decides whether subsequent events in a dependency case have rendered the appeal moot and whether its decision would affect the outcome of the case in a subsequent proceeding”]; *In re Daisy H.* (2011) 192 Cal.App.4th 713, 716; *In re C.C.*, at p. 1488.)

Here, the juvenile court's unchallenged determination that Jennifer is a current user of cocaine and marijuana, which renders her incapable of providing N.C., Timothy and Matthew with regular care and supervision, necessarily means its previous finding that Jennifer abused marijuana, even if erroneous, will not have any adverse impact on the current or future dependency proceedings. (See generally *In re T.W.* (2013) 214 Cal.App.4th 1154, 1161 [“[i]n the jurisdictional phase of a section 387 proceeding, the court determines whether the factual allegations of the supplemental petition are true and whether the previous disposition has been ineffective in protecting the child”].)⁵

⁴ Although Jennifer initially argued the Department's motion to dismiss this appeal was premature because the time for her to appeal the court's April 29, 2016 order had not yet expired, no appeal was filed by the June 28, 2016 jurisdictional deadline. (See Cal. Rules of Court, rule 8.406(a)(1) [notice of appeal must be filed within 60 days after the making of the order being appealed].)

⁵ Jennifer correctly observes that, although we may take judicial notice of the Department's filings and the juvenile court's findings and orders on the section 387 petition, we may not deem true the hearsay statements in the reports or minute orders. (See *In re Vicks* (2013) 56 Cal.4th 274, 314.) But it is the fact the court found Jennifer was a current user of cocaine and marijuana and ordered her to a drug treatment program,

Similarly, the disposition order of April 29, 2016, which terminated the home-of-parent (mother) order and removed the children from Jennifer's care and custody, now specifies Jennifer's case plan and includes the requirement she complete a full drug abuse treatment program. Any error in the earlier plan is inconsequential. Under these circumstances Jennifer would not obtain any effective relief from a reversal of the jurisdiction findings or disposition order of August 13, 2015. Her appeal is moot. (*In re A.B.*, *supra*, 225 Cal.App.4th at p. 1358.)

In opposition to the Department's motion to dismiss, Jennifer suggested her appeal was not moot because "[t]he evidence allegedly obtained subsequent to and as a result of these erroneous findings and orders are what the department alleged and relied upon in filing the 387 petition. . . . Without the improperly obtained subsequent information, the findings and orders on the 387 petition likely would not have been made." In other words, Jennifer asserted, but for the purportedly erroneous initial jurisdiction finding and disposition order requiring her to drug test, the Department would have never learned she was using cocaine and continuing to use marijuana, creating a substantial risk of harm for her three young children. This rather remarkable argument has two fundamental flaws. First, to the extent Jennifer wanted to challenge the admissibility of evidence obtained as a result of court-ordered drug testing, the issue should have been raised in an appeal from the order sustaining the section 387 petition. Because Jennifer did not appeal from that order, this issue is forfeited. (See *In re Eric A.* (1999) 73 Cal.App.4th 1390, 1394-1395 ["[b]y agreeing [at a review hearing during the pendency of his appeal] that the juvenile court's initial assumption of jurisdiction was justified by conditions that 'still exist,' [father] waived his right to complain about the court's action on appeal".])

Second, the protections afforded parents in a dependency proceeding are not the same as those afforded defendants in a criminal proceeding. (See *In re James F.* (2008) 42 Cal.4th 901, 915.) Whatever error the juvenile court may have committed in ordering

not the truth of the underlying allegations themselves, that supplants the court's earlier findings and order and moots her appeal.

Jennifer to drug test, the positive results from those tests would be admissible in dependency proceedings initiated to protect her children: “[U]nlike a defendant in a criminal proceeding, ‘[a] parent at a dependency hearing cannot assert the Fourth Amendment exclusionary rule, since “the potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence” unlawfully seized.’” (*Ibid.*)

DISPOSITION

The appeal is dismissed as moot.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.